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In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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The Sixth Circuit specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." Pet. App. 17. It nonetheless held that Petitioners were required to exhaust IDEA proceedings because they "*could have* used IDEA procedures to remedy" the "core harms that [they] allege" in this lawsuit. Pet. App. 6 (emphasis added). Respondents urged the Sixth Circuit to adopt that holding, and they defended that holding at the petition stage.

The Sixth Circuit's holding flatly contradicts the text of the Handicapped Children's Protection Act (HCPA). That text requires exhaustion only when the plaintiff is *actually* "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*)—not simply when the plaintiff experienced an injury for which he or she *could have sought* relief under the IDEA. The HCPA's text thus adopts a "relief-centered," rather than an "injury-centered," rule. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874 (9th Cir. 2011), cert. denied, 132 S. Ct. 1540 (2012); Pet. Br. 20-27. The plain meaning of the text finds support in basic administrative law principles and the legislative history. Pet. Br. 28-43.[1]

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[1] Respondents misquote the legislative history. They quote Senator Simon as stating that "'parents are required to exhaust the [IDEA's] administrative remedies' if '[a] suit *could have been filed* under the [IDEA].'" Resp. Br. 26 (quoting 131 Cong. Rec. S10,400-S10,401 (daily ed., July 30, 1985); emphasis and alterations in Respondents' brief). Respondents' brackets are carefully placed. Senator Simon did not say that exhaustion was required if "a" suit could have been filed under the IDEA. He said that "[w]hen parents choose to file suit under another law that protects the rights of handicapped children," exhaustion is required "if *that suit* could have been filed under the Education for the Handicapped Act." 131 Cong. Rec. S10,400 (emphasis added).

Respondents now concede that the Sixth Circuit's holding "goes too far." Resp. Br. 30. They acknowledge that the HCPA requires exhaustion only when the plaintiff's action actually seeks relief that is also available under the IDEA. But, they argue, what matters is substance and not form—if the action seeks relief that is available *in substance* under the IDEA, Respondents contend that the HCPA requires exhaustion.

Respondents gain no ground with their eleventh-hour form-versus-substance argument. Whether one looks at the matter formally or substantively, the IDEA does not authorize disabled children to recover emotional distress damages—monetary payments to compensate for, rather than prospectively counteract, a past social or emotional harm. An ADA or Rehabilitation Act action seeking emotional distress damages thus seeks relief that is not available under the IDEA in form or substance.

Petitioners have never sought, and do not now seek, the reimbursement, compensatory-education, or counseling remedies available under the IDEA. Nor have Petitioners sought a change to an IEP Respondents never accused Petitioners of seeking such relief until their latest filing in this Court. Because the emotional distress damages Petitioners *do* seek are not

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If the parents' suit seeks a type of relief the IDEA does not provide, then "that suit" could not have been filed under the IDEA. Senator Simon made the point explicit in the very next paragraph, where he stated that the HCPA would not require exhaustion "where the hearing officer lacks the authority to grant the relief sought." 131 Cong. Rec. S10,401. Identical language appears in the House report. See Pet. Br. 36.

available under the IDEA, exhaustion was not required.

I. No Party Defends the Sixth Circuit's Holding

The Sixth Circuit recognized that Petitioners "seek money damages, a remedy unavailable under the IDEA." Pet. App. 17 But the court inexplicably deemed that fact irrelevant. Rather, what it believed mattered was that Petitioners "could have" invoked IDEA proceedings to obtain *different* remedies for "the injuries alleged in the complaint." Pet. App. 15. The court held that, even if plaintiffs are not actually seeking relief available under the IDEA, the HCPA "requires exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." Pet. App. 6. Because Petitioners "could have used IDEA procedures to remedy" the "core harms" they alleged, Pet. App. 6, the Sixth Circuit held that exhaustion was required here.

The Sixth Circuit thus adopted the "injury-centered" approach to interpreting the HCPA. *Payne*, 653 F.3d at 874. And it did so at Respondents' urging. In their motion to dismiss, Respondents described this case as "nearly identical" to other cases "seeking money damages not available under IDEA's administrative procedures." D.Ct. Dkt. 17 at 24; accord *id.* at 23. They argued that "when the focus of the claim is the educational rights of the student, administrative remedies must be exhausted"—and that "**[t]his is so even if the plaintiff is seeking an award that the administrative procedure cannot grant, such as money damages.**" *Id.* at 15-16 (emphasis in original).

Respondents' Sixth Circuit merits brief included identical language. Resp. 6th Cir. Br. 20, 25. Respondents argued that "'even when the plaintiff seeks money damages,'" the "'administrative process might ultimately afford sufficient relief to the injured party, even if it is not the specific relief that the plaintiff requested.'" *Id.* at 20 (quoting *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 916-917 (6th Cir. 1992)). Respondents stated the legal test as follows: "[W]hen a plaintiff has alleged injuries that **could be redressed to any degree** by the IDEA's procedures and remedies, exhaustion of those remedies is required." *Id.* at 16 (internal quotation marks omitted; emphasis in original). The Sixth Circuit simply adopted Respondents' arguments, and Respondents defended that holding in their petition-stage briefing. BIO 6, 16-17, 21-22; Resp. Supp. Br. 7-8. Respondents' Brief in Opposition said that "the only reasonable interpretation of § 1415(*l*) is to require families to utilize IDEA administrative procedures if some form of remedy can also be provided by the IDEA, *regardless of the type of relief specifically sought*." BIO 23 (emphasis added).

Respondents have now abandoned their earlier position, and no longer defend the Sixth Circuit's injury-centered holding. Respondents acknowledge that the HCPA's exhaustion requirement "turns on the substance of the 'relief' the plaintiff 'seek[s],' not the nature of the injury alleged." Resp. Br. 30 (quoting 20 U.S.C. § 1415(*l*)). See also *id.* at 38 ("The requirement of exhaustion under section 1415(*l*) turns on what relief a plaintiff seeks, not why he seeks it."). Respondents admit that lower courts, including the Sixth Circuit, "have used a broader formulation, saying that section

1415(*l*) requires exhaustion whenever a complaint 'allege[s] injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies.'" *Id.* at 30 (quoting *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 642 (6th Cir. 2008); emphasis in Respondents' brief). That, Respondents now concede, "goes too far." *Id.*

Respondents instead have radically shifted their argument. They now submit that this suit *is* one "seeking relief that is also available under the IDEA," because IDEA proceedings offer, in substance, the same relief as the Fry family seeks. Resp. Br. 44. As we show below, Respondents are incorrect. But the overriding point is this: No party before this Court defends the Sixth Circuit's holding.[2] Under that holding, exhaustion is required whenever a plaintiff alleges an injury that can be remedied in any way in IDEA proceedings, even if those proceedings cannot, in form or substance, provide the specific remedy the plaintiff seeks. All parties now concede that holding was wrong.

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[2] Given their renunciation of the legal analysis on which the Sixth Circuit—like most other circuits, Pet. 12-15—relied, Respondents' suggestion that Congress ratified a settled judicial construction (Resp. Br. 31) rings hollow. Such implicit ratification of lower-court decisions can hardly overcome the plain statutory text in any event.

II. Emotional Distress Damages Are Not Available in Form or Substance Under the IDEA

A. A Substantive Approach Cannot Efface the Limits on Relief Available Under the IDEA

Respondents' new position rests on a fundamental mischaracterization of Petitioners' argument. Respondents assert that Petitioners "contend that section 1415(*l*) is concerned with form alone." Resp. Br. 31. They suggest that our position rests on "the contention that the statute's application turns on the form of a plaintiff's prayer for relief." Resp. Br. 28. Respondents are wrong.

A substantive approach does not eliminate the basic principle that some types of relief are available in IDEA proceedings and others are not. As Respondents now concede, exhaustion is required only when the suit is actually seeking a type of relief that is, in substance, available under the IDEA. See Resp. Br. 19 (stating that the HCPA "makes exhaustion turn on what 'redress or benefit' a plaintiff requests"); *id.* at 15 (describing the HCPA as analogous to other statutes "that make a plaintiff's right to sue dependent on the type of 'relief' he seeks"). Even if, in Respondents' terms, IDEA proceedings might afford a disabled child *some* "redress or benefit," the HCPA does not require exhaustion unless the child's non-IDEA lawsuit is actually seeking a type of redress or benefit that is available in IDEA proceedings.

All parties agree that compensatory damages for pain, suffering, and emotional distress are not available in IDEA proceedings. See Pet. Br. 5; Resp.

Br. 7, 36. All parties also agree that other types of relief—such as tuition reimbursement or prospective changes to an IEP—*are* available in IDEA proceedings. See Pet. Br. 5; Resp. Br. 6. And all parties agree that a child with a disability cannot evade the limitations on relief available in IDEA proceedings—or the HCPA's reciprocal limitations on the right to proceed directly to court on a non-IDEA claim—through "lawyerly inventiveness." Resp Br. 26 (internal quotation marks omitted). A disabled child cannot evade the HCPA's exhaustion requirement simply by filing an ADA suit seeking something labeled "damages" that is measured by the cost of private-school tuition. Tuition reimbursement is available in IDEA proceedings; the label a party attaches to the relief does not govern. See Pet. 16 n.7; Resp. Br. 19.[3]

But this principle goes both ways. If a child with a disability filed an IDEA administrative claim seeking monetary compensation for pain, suffering, and emotional distress, the request for relief would fail. Such compensation is not available in IDEA proceedings. The request would fail even if the child's lawyer called the compensation "reimbursement" rather than "damages." And because monetary compensation for pain, suffering, and emotional injury is not available in IDEA proceedings, a disabled child

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[3] This is the position that the Government took, and the Ninth Circuit endorsed, in *Payne*, 653 F.3d at 875. It is also the position that Petitioners have taken in our prior filings in this Court. See Pet. 16 n.7. The Solicitor General has likewise made clear that a plaintiff who seeks tuition reimbursement or compensatory education must exhaust IDEA proceedings, regardless of the label attached to that relief. See U.S. Br. 5, 34.

seeking such compensation in a non-IDEA suit need not exhaust those proceedings. Again, it is the substance of the relief requested, rather than the label attached to it, that matters.

A substantive approach thus tells a court how to determine whether the type of relief the plaintiff seeks is available under the IDEA. It does not eliminate the IDEA's own limitation on the remedies available under the statute. Nor does it eliminate the HCPA's basic rule that exhaustion is required only when the plaintiff's action "seek|s| relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*).

The cases on which Respondents rely underscore the point. See, *e.g.*, *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (applying the prospective/retrospective distinction that controls whether relief is available under *Ex parte Young*, 209 U.S. 123 (1908), but holding that the distinction does not turn on the label a party attaches to a request for relief); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (applying the equitable/legal distinction that controls whether relief is available under ERISA, but holding that the distinction does not turn on a party's label); *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 659 (2016) (same); *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 263 (1999) (enforcing the limitation on proceedings under 5 U.S.C. § 702(a) to cases "seeking relief other than money damages" but holding that the "damages" category is defined by substance rather than labels). These cases do not stand for the proposition that courts should efface the limitations that the law places on the relief available in particular fora. To the contrary, the

Court firmly enforced those limitations. Rather, Respondents' cases simply stand for the proposition that courts should look beyond labels and focus on the substance of the relief. That proposition does not aid Respondents.

B. Emotional Distress Damages Are Different in Substance From the Relief Available Under the IDEA

There is a real difference—in substance and not just form—between emotional distress damages and the relief available in IDEA proceedings. Respondents suggest that there is little substantive difference between emotional distress damages and two types of relief available under the IDEA: (1) compensatory education and counseling; and (2) reimbursement of educational expenses. Resp. Br. 30-31. Respondents are incorrect.

Take compensatory education first. An order to provide services to prospectively reduce the harms flowing from a statutory violation is very different in substance from an order to pay money to make the plaintiff whole for past pain, suffering, and emotional distress. The law consistently distinguishes between prospective relief and retrospective damages—even where those remedies respond to the same harms. That is the central distinction applied in this Court's Eleventh Amendment cases, on which Respondents themselves rely. See Resp. Br. 20, 22-23. In *Milliken v. Bradley*, 433 U.S. 267, 288-289 (1977), for example, the Court recognized that the plaintiffs could not recover retrospective monetary relief against Michigan for its past school segregation. But it approved an order requiring the state to pay for compensatory

education programs to counteract the effects of the segregation. See *id.* at 289-290. "That the programs are also 'compensatory' in nature," the Court explained, "does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system." *Id.* at 290.

Compensatory education and counseling are available under the IDEA in some circumstances; money to compensate for past emotional harms is not. A civil action seeking only the latter remedy is not "seeking relief that is also available under" the IDEA. 20 U.S.C. §1415(*l*). That the plaintiff seeking emotional distress damages might instead have chosen to seek the prospective provision of education and counseling does not mean that the plaintiff *actually* sought the latter remedy, in form or substance. Under the plain text of the HCPA, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Payne*, 653 F.3d at 875 (emphasis in original). General exhaustion principles, too, focus on what the plaintiff *actually* sought, rather than what she *could have* sought. See *McCarthy v. Madigan*, 503 U.S. 140, 154 (1992) (refusing to presume "that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, that he is likely interested in 'other things'").

Next, consider the monetary relief available under the IDEA. Respondents argue that "the IDEA plainly makes available many of the same 'benefit[s]'—including money—that plaintiffs may seek in the form of compensatory damages." Resp. Br. 32. But the type

of monetary relief available under the IDEA is very different from compensation for past emotional harms. Respondents point to two types of monetary relief that are available under the IDEA. Resp. Br. 6-7. The first is reimbursement of private-school tuition for periods in which a school district failed to provide the child a free appropriate public education. See *id.* at 6. The second is "prospective monetary relief for 'compensatory education,' including tutoring, counseling, and remedial therapy designed to compensate for 'educational services [a] child should have received in the first place.'" *Id.* (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005)).

The law has long recognized a distinction—of substance and not just form—between monetary relief that reimburses a plaintiff for the cost of services that the defendants failed to provide and monetary relief that compensates a plaintiff for the emotional harms caused by a past violation of law. This distinction appears in the very cases on which Respondents rely. In *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988), the Court distinguished between "money damages," which "normally refers to a sum of money used as compensatory relief" that is "given to the plaintiff to *substitute* for a suffered loss," and "specific remedies," which might take the form of money but "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." (emphasis in original; internal quotation marks omitted). The Court applied this same distinction between "substitute relief" and "specific relief" in *Blue Fox*, 525 U.S. at 262.

Tuition reimbursement and money for compensatory education are specific relief. Indeed, *Bowen* itself pointed to IDEA tuition reimbursement as an example of substitute relief that is distinct from damages. See *Bowen*, 487 U.S. at 894 (quoting *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370-371 (1985)). Money paid in these IDEA remedies is earmarked for defraying a specific out-of-pocket cost—the cost of providing educational services. Hearing officers and courts may even require payments for reimbursement and compensatory education to be placed in an escrow account so that the parents may use them *only* for those purposes. See, *e.g.*, *Streck v. Bd. of Educ. of E. Greenbush Cent. Sch. Dist.*, 408 F App'x 411, 415 (2d Cir 2010). As the cases Respondents cite demonstrate, compensatory education awards often do not involve *monetary* relief at all. See, *e.g.*, *Reid*, 401 F.3d at 523-524 (ordering school district to provide compensatory services prospectively); *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (describing compensatory education as "specific non-monetary equitable relief"). And although they may contribute to improving a disabled child's condition in the future, even monetary payments for reimbursement and compensatory education cannot make the child whole for past emotional injuries.

Payments to compensate for pain and suffering are very different. They are a classic form of substitute relief. Such payments do not reimburse specific out-of-pocket costs, and they are not earmarked for financing particular services in the future. In many cases, as here, they do not even respond to *educational* injuries of the type recognized by the IDEA. Rather, they represent a necessarily imperfect effort to make the

child whole for past emotional injuries. A disabled child who files an ADA lawsuit seeking monetary compensation for pain and suffering is not "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), even if she *could have* sought a *different* monetary remedy for specific relief in IDEA proceedings.

C. The Mere Fact That a Suit Involves a School's Treatment of a Child with a Disability Does Not Implicate IDEA Remedies

Respondents state that "whenever plaintiffs seek relief for injuries caused by a school's failure to provide an accommodation for a child with a disability, it is highly probable that awarding that relief would invalidate or alter the child's IEP." Resp. Br 30 (internal quotation marks omitted).[4] Respondents are wrong. Indeed, the suggestion that IDEA remedies will be implicated by the mere fact that a suit involves a school's treatment of a disabled child is at war with the HCPA. That statute addresses educational suits

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[4] Respondents suggest that some such cases will not implicate the child's IEP, but it is not clear how they determine what cases would fall into that category. Respondents state that a suit seeking compensation "for pain and suffering or medical expenses incurred as a result of discrete instances of past abuse" could proceed without exhaustion, because it "would presumably not implicate the validity of the child's IEP." Resp. Br. 36-37. As an example of that sort of case, Respondents cite *Payne*. See Resp. Br. 36-37. But the abuse in *Payne* took the form of a teacher's (incredibly misguided) classroom-management practice—repeatedly placing a child in a locked "time-out room or 'safe room' for students who became 'overly stimulated'"—that was specifically addressed in the IEP process. *Payne*, 653 F.3d at 865-866. If *Payne* did not implicate an IEP, this case does not do so, either.

brought under "Federal laws protecting the rights of children with disabilities," and it requires administrative exhaustion only for those suits that are "seeking relief that is also available under this subchapter." 20 U.S.C. § 1415(*l*). If the mere fact that a disabled child was suing over her treatment at school meant exhaustion was required, the "seeking relief" clause would be superfluous.

There are numerous circumstances in which a child's successful ADA suit—whether for damages or declaratory relief—will not require alteration of her IEP For one thing, the child may have left the school district by the time the lawsuit is decided. See, *e.g.*, *Payne*, 653 F.3d at 866 (noting that the parents "removed D.P. from the public school system and began home schooling him" before filing suit). At that point, a successful lawsuit may compel the district to pay damages, but there will be no IEP to invalidate or change.[5]

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[5] Respondent is wrong to suggest (Resp. Br. 35 & n.9, 39) that exhaustion would be required here under the approach the Government advocated in *Payne*. The Government's brief in that case argued that only challenges to "the adequacy of a student's *ongoing* education" could require a change to the IEP. DOJ *Payne* Br. 22 (emphasis added). See also *id.* at 11-12 (stating that "the functioning and purpose of the IDEA hearing process presupposes an ongoing educational dispute between student and school district and is designed to address a student's current and future educational needs rather than adjudicate tort liability for past misconduct"); *id.* at 17-18 (similar); *id.* at 14 ("Where a plaintiff has no ongoing educational dispute with the defendant school system and neither sues under the IDEA nor seeks relief available under the IDEA, nothing in this provision requires exhaustion of IDEA procedures."); *id.* at 22 (referring to "an ongoing IDEA-related practice," "the ongoing practice," and

Even if the child remains in the district, the accommodation the plaintiff seeks in an ADA suit may not be one the IDEA requires to be included in an IEP. The IDEA requires accommodations to be included in an IEP only if they aim to achieve the statute's educational goals. See 20 U.S.C. § 1414(d)(1)(A)(i). Although a successful ADA suit might lead to a change in how the school district treats a child with a disability, it does not follow that the district would have to memorialize that change in an IEP And an order invalidating or amending the IEP is available in IDEA proceedings only if the failure to accommodate denies a free appropriate public education or otherwise imposes the kind of educational deprivation that violates the IDEA. See 20 U.S.C. § 1415(f)(3)(E). A lawsuit seeking an accommodation that does not involve such an educational deprivation thus is not seeking relief available under the IDEA.

And even if a successful ADA suit for damages or declaratory relief might ultimately lead a school to propose a change in a child's IEP, that does not mean that the plaintiff was "seeking" such a change as "relief" in the suit. See Black's Law Dictionary (10th ed. 2014) (defining "relief" as "[t]he redress or benefit . that a party asks of a court"). Any change the school proposed at that point would have to proceed through the IDEA process of negotiation, administrative proceedings, and possibly judicial

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"challenges to ongoing educational practices"). The Government's brief argued that the family in *Payne* "had no ongoing dispute with the school or the district that required an IDEA hearing to resolve, and thus they had no further remedies to exhaust." *Id.* at 24-25. As we show below, the same is true of Petitioners here.

review, before it became effective. The integrity of IDEA proceedings would thus be fully preserved.

III. Because This Case is Not Seeking Relief Available Under the IDEA, Exhaustion Was Not Required

A. Petitioners are Not Seeking Relief Available Under the IDEA.

Petitioners' complaint sought one principal type of relief—"damages in an amount to be determined at trial." BIO App. 21. As we have made clear throughout our briefing, that request referred to emotional distress damages, a type of relief that is not available in form or substance in IDEA proceedings. Pet. 1-2; Pet. Br 14.

Respondents now argue that the term "damages" might be stretched to include reimbursement of educational expenses or payments for compensatory education or counseling. Resp. Br. 44-48. Respondents are engaging in the very "lawyerly inventiveness" they project onto Petitioners. As Respondents' cases demonstrate, the law generally uses the term "damages" to refer to "substitute relief" rather than "specific relief." See *Blue Fox*, 525 U.S. at 261-262; *Bowen*, 487 U.S. at 895. The complaint here used the term in its standard legal sense. Tellingly, Respondents cannot point to a single paragraph of the complaint that alleges any (past or future) out-of-pocket educational or counseling expenses that might require reimbursement, much less any ongoing need for compensatory education or counseling. And to the extent any ambiguity remains, we reiterate: Whether under the label of damages, declaratory relief, or any

other relief, Petitioners do not seek tuition reimbursement, compensatory education, counseling, or any other "substitute" monetary relief. Nothing in the HCPA required Petitioners to first seek in-kind IDEA remedies before seeking entirely different relief under other statutes. See *Payne* 653 F.3d at 880-881.

Respondents argue that Petitioners' request for damages and declaratory relief under the ADA and Rehabilitation Act effectively seeks a judgment that E.F 's IEP was invalid. Resp. Br. 49-50. But Petitioners have not sought a change to the IEP, nor would this litigation lead to one. Respondents have consistently taken the position that allowing Wonder to accompany E.F to school was not necessary to achieve the IDEA's educational goals. See Pet. Br. 10-13. We have not challenged that position in this litigation. Rather, we have alleged that exclusion of the service dog violated the independent requirements of the ADA and the Rehabilitation Act. The Department of Education thus concluded that a "FAPE analysis"—the same analysis required to determine whether the IEP was invalid—was inapposite here. J.A. 35. And indeed, the IEP did not *prohibit* Respondents from allowing E.F to be accompanied by her dog; it simply noted that Respondents had refused to allow it. BIO App. 8. As a result, as Judge Daughtrey noted in her dissent below, allowing Wonder to accompany E.F "would not require a modification of [the] IEP " Pet. App. 27

Indeed, because all parties agree that the exclusion of Wonder did not deny E.F a free appropriate public education, *no* relief would have been available to Petitioners in IDEA proceedings. Pet. Br. 46-48.

Respondents argue that this "makes no difference" and that relief is "available" under the statute even if "the plaintiff may not ultimately be entitled to" it. Resp. Br. 51. But this Court has applied a practical, "real-world" interpretation of what remedies are "available" in administrative proceedings. *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016). A remedy is available only if it is in fact "capable of use" or "is accessible or may be obtained." *Id.* at 1858 (internal quotation marks omitted). Because all parties agree that there is no IDEA violation here, no relief could have been obtained under that statute.

If E.F had remained in the school district, and Petitioners ultimately prevailed in this suit, Respondents might have decided to propose changes to her IEP in response to the court's judgment. Any such proposals could at that point have been addressed through the IDEA's process of negotiation and administrative review But a successful ADA suit would not have *required* any IEP change. And because E.F has left the school district and has no intention of returning, Pet. Br 14, Petitioners lack standing to seek any forward-looking relief against Respondents in any event. There is, simply, no current IEP that this litigation could change. See Pet. Br. 49.[6]

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[6] Respondents assert that Petitioners waived any argument that exhaustion would be futile here. Resp. Br. 53-57. But throughout this litigation Petitioners have consistently invoked the HCPA's "seeking relief that is also available" language—language that codifies one aspect of the futility exception. See Pet. Br. 28-32. Respondents suggest that our reading would render superfluous the HCPA's language requiring exhaustion in non-IDEA cases only "to the same extent as" in IDEA cases. Resp. Br. 55. Not so. The

Respondents suggest that, by removing E.F. from their district, the Fry family has waived its claim that IDEA remedies are unavailable. Resp. Br. 51, 57. That suggestion disregards a key fact: This civil action is not seeking—and cannot seek—a change to the IEP, nor is it seeking other IDEA remedies. Nor is there any requirement that individuals must continue to subject themselves to legal violations in order to seek damages for those violations. For three school years, Petitioners diligently engaged with Respondents and pursued administrative remedies, before they ultimately found it necessary to move E.F. to a district that would embrace her and her dog. Pet. Br. 10-14. This Court has recognized that parents do not forfeit the right to obtain relief when they are forced to make such difficult choices for their children. See, *e.g.*, *Sch. Comm. of Town of Burlington*, 471 U.S. at 370.

B. If the Court Concludes that the Complaint Embraces Other Requests for Relief that Should Have Been Exhausted, It Should Allow the Claim for Emotional Distress Damages to Proceed

As we have shown, the complaint sought emotional distress damages, which are not available under the IDEA. The complaint does not allege any educational

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"seeking relief" language makes clear that, whatever *other* aspects of the futility doctrine a court might choose to apply under the "to the same extent" language, exhaustion is not required in non-IDEA cases unless the relief the plaintiff seeks is available in IDEA proceedings. The "seeking relief" language "made a conclusion clear that might otherwise have been fought over in litigation," so there is no surplusage. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 87 (2002).

expenses that might require reimbursement, nor does it allege any ongoing need for compensatory education or counseling. The complaint does not seek to change an IEP. Because Petitioners left the school district more than four years ago and have no intention to return, there is no IEP to change, and they could not seek forward-looking relief against Respondents even if they wanted to. And because all parties agree there was no IDEA violation here, no relief would have been available in IDEA proceedings in any event. This case is thus not "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*).

If the Court nonetheless concludes that the complaint may be read to embrace a request for some relief that *is* available under the IDEA—whether in the requests for damages or declaratory relief under the ADA and the Rehabilitation Act, or in the boilerplate request for "any other relief the court deems appropriate"—the Court should allow at least the request for emotional distress damages to proceed.

First, although Fed. R. Civ. P. 54(c) authorizes a plaintiff to receive any relief to which she is "entitled," it is a basic principle that "relief that the parties do not desire should not be forced on them." 10 Wright et al., Fed. Prac. & Proc. Civ. § 2662 (3d ed. & Apr. 2016 update). Requests for relief are not frozen at the time the complaint is filed. For example, in *Steffel v. Thompson*, 415 U.S. 452 (1974), the complaint sought declaratory and injunctive relief against a threatened state criminal proceeding. On appeal from dismissal of his action, the plaintiff abandoned his request for injunctive relief, and this Court considered only the request for declaratory relief. *Id.* at 463. See also

Walker v. Anderson Elec. Connectors, 944 F.2d 841, 844 (11th Cir. 1991) (plaintiff was not "entitled" to declaratory and injunctive remedies under Rule 54(c) when she sought them in her complaint but abandoned the request later in the proceedings), cert. denied, 506 U.S. 1078 (1993). The whole point of Rule 54(c) is "to eliminate the theory-of-the-pleadings doctrine and decrease the importance of the pleading stage in federal litigation." 10 Wright et al., *supra*, § 2662 (footnotes omitted). Requiring exhaustion because the complaint might conceivably support particular types of relief—even though Petitioners have specifically renounced any request for them—would reinstitute the "tyranny of formalism" that Rule 54(c) aims to avoid. *Id.* § 2662 n.20.

Second, under basic exhaustion principles, dismissal of the entire action is not appropriate simply because *some* of the complaint's requests for relief implicate an exhaustion requirement. In *Jones v. Bock*, 549 U.S. 199, 221 (2007), this Court applied the general rule that "if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad." It thus held that the total-exhaustion rule—under which an entire case should be dismissed if one claim should have been exhausted—was limited to habeas corpus cases. See *id.* at 221-222. As the Court explained, in habeas cases all claims generally seek the same relief—release from custody See *id.* at 221. But when a case contains multiple requests for distinct forms of relief, this Court typically treats those requests separately. See *Los Angeles v. Lyons*, 461 U.S. 95, 101, 109 (1983) (plaintiff lacked standing for his "claim for injunctive relief" but could proceed on his "claim for damages").

Although the complaint plainly requests damages relief for which exhaustion is not required, Respondents argue that the entire case should be dismissed because the complaint might arguably embrace *other* requests for relief that should have been exhausted. Under *Jones*, this Court should allow Petitioners to proceed on their claims for emotional distress damages, even if it concludes that the complaint could encompass other forms of relief that should have been exhausted. At the very least, the Court should follow the procedure that applies in habeas cases and allow Petitioners to delete any (implied) requests for relief that are barred by the exhaustion requirement so that Petitioners may proceed with the others. See *Jones*, 549 U.S. at 222 (quoting *Rhines v. Weber*, 544 U.S. 269, 278 (2005)).

Third, Respondents' approach would eviscerate the limitations Congress "baked into [the] text," *Ross*, 136 S. Ct. at 1862, of the HCPA's exhaustion requirement. Congress limited exhaustion to non-IDEA cases "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). If a plaintiff is deemed to be "seeking" any remedy a court might award—even if she has renounced any desire to obtain that remedy—then the HCPA's express limitation is meaningless. If Respondents were right, Congress would have written the HCPA to require exhaustion in any case "in which the plaintiff might be entitled to relief that is also available under" the IDEA. Congress's use of the word "seeking" instead demonstrates a desire to focus the exhaustion inquiry on what the plaintiff actually is attempting to obtain in her lawsuit, not on what a court might hypothetically award. See Pet. Br. 22-23 n.5 (dictionary definitions of "seek"). Because

Petitioners are actually seeking emotional distress damages, which are not available under the IDEA, the Sixth Circuit was wrong to require exhaustion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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